through the city that was not authorized by city authorities." Moreover, the ambassador was "pleased to inform the Post's readers" that the dissident had since been released.[8]

So too, the FCC emphasized that it did not adopt a rule but instead a "processing guideline that allows broadcasters more discretion in choosing the ways in which they will meet their CTA obligations."[9] The three-hour target is not a firm requirement, according to the commission; it simply provides "clear but nonmandatory guidance on how to guarantee compliance."[10]

The three-hour requirement is "nonmandatory" only in a very technical sense. Certainly, broadcasters have a choice. They can either meet the FCC's programming targets and have their licenses renewed automatically, or they may avail themselves of a "full opportunity to demonstrate compliance with the CTA" by submitting their renewal applications for full commission review, spending tens of thousands of dollars, and subjecting their future operations to great uncertainty. The FCC has further rigged the game by expressly refusing to specify what efforts (short of three hours) would secure license renewal.[11]

Stripping away the references to "nonmandatory guidance" and "flexibility" in the FCC order, the government's message to broadcasters is clear. As Chairman Hundt said in an interview before the FCC's order was issued,

> I want us to write a rule that guarantees that there will be a minimum of three [hours of children's educational and informational programs per week]. I want us to write a rule that has three in it. And I don't want us to write a rule that has Greek in it that you have to translate into three. . . . In order to get a majority, I'm still willing . . . to adopt a processing guideline technique, but it needs to be a processing guideline that has three in it.[12]

After the order was adopted, the chairman characterized the decision as "guidelines calling for a minimum of three hours a week of educational programming for children." He concluded that "the FCC passed a rule that asks for a quantified and specific amount of educational television."[13]

And if that does not sound enough like a rule, the FCC has long understood the practical effect on broadcasters of such "guidance." When the commission considered various

alternatives to the fairness doctrine in the late 1980s, proposals included "establishing guidelines as to the amount of news, public affairs and other informational programming a licensee must carry" and reviewing compliance with the doctrine at license renewal time, rather than on a complaint-by-complaint basis.[14] The FCC rejected those proposals, however, in part because such procedures "would serve only to provide government with the means to dictate the specific issues which must be covered by particular licensees, making . . . enforcement more content-based than is current enforcement."[15] Retired Supreme Court justice William Brennan has pointed out that FCC guidance is successful "precisely because the 'death sentence' could be imposed" and that the licensing power of the FCC "hangs like a constant Damocles' sword over broadcasting."[16]

Policy Schizophrenia

Once the reader penetrates the bureaucratic code employed by the drafters of the Children's Television Order, its mandate is clear and consistent: every television station in the nation must transmit a specified amount of programming that the FCC deems to be sufficiently edifying, of the approved format, and broadcast at the approved times, or else. Beyond that, it is difficult to form a coherent picture that captures the FCC's attitudes about children, their parents, the market for children's programming, or even the need for more educational shows.

The underlying premise of both the CTA and the FCC's rules is that market forces are insufficient to ensure that commercial stations provide enough educational programming. Leaving aside the fact that that premise flows from the assumption that there is "an underprovision of children's educational and informational television programming,"[17] and not from the voluntary choices made by television viewers, the policy solution adopted by the FCC is somewhat strange.

The rules require broadcasters to label "core educational programming" in advance of each show and to publish notices of such programs in television listings. But to what purpose? The rules are based on the idea that the audience has chosen not to watch those shows. In fact, the FCC adopted the notice requirements over the warnings of the Children's Television Workshop, among others, that "on-air identifiers could taint educational programs" and that the educational designation for programming "is likely to have a negative connotation" for the intended audience.[18] Evi-

dently, the on-air identification and program listing requirements will inform people of which shows to avoid, and when.

Undaunted by the fact that the very reason the government concluded that programming mandates are necessary is also a reason that they are likely to fail, the commission also concludes that "an identification requirement may benefit small stations by affording a potential increase in audience size."[19] But how? The FCC order is based on the assumption that broadcasters have little incentive to provide educational programming because small and fragmented audiences result in smaller advertising revenues.[20]

It could be that the FCC assumes that, armed with better information, parents will be able to direct their children to worthy programming. But there is a problem with such reasoning. In crafting rules to protect children from "indecent" programming, the government argued vigorously that parents are essentially inert--that they do not read program guides, are not home to supervise their children, and lack control over their children's viewing choices (because, among other things, they have purchased televisions for the kids' bedrooms).[21] If parents cannot prohibit "indecent" viewing, how can they mandate "educational" viewing?

More to the point, the FCC's order is remarkably short on proof that there is any pressing need to coerce broadcasters into providing more worthy programming. The various studies of educational programming cited by the commission do not support the decision. In surveys of 48 randomly selected television stations in 1992 and 1994 by an academic researcher, commercial stations reported airing on average 3.4 hours per week of regularly scheduled, standard-length educational programming (although the researcher believed that some of the claims of educational value for the shows were "frivolous").[22] A survey by the National Association of Broadcasters of 559 stations in 1994 found that the average station aired almost 4.33 hours per week of educational and informational programming. Another survey by the Association of Local Television Stations, polling 78 local independent stations, found that the average station aired 3.77 hours per week of educational programming in the first quarter of 1995.[23]

The FCC described the various surveys as "inconclusive" but decided just the same that it could "conclude that some broadcasters are providing a very limited amount of programming specifically designed to educate and inform chil-

dren."[24] In other words, even though the FCC did not know how much educational programming existed, or whether it matched the government's current view on what is sufficiently "educational" or "informational," it nevertheless decided to adopt its new programming rules. As Judge Richard Posner wrote in another context, "Stripped of verbiage," the commission's order, "like a Persian cat with its fur shaved, is alarmingly pale and thin."[25]

It is also worth noting that, since most of the studies indicate that the average TV station is airing more than three hours of educational programming per week, the new rules could result in a decrease in such programming. Proponents of the rules would quickly point out that the claimed amounts of programming are inflated by extravagant claims of the educational value of The Flintstones or The Jetsons. But it is generally forgotten in the policy debates at the FCC that Congress in the legislative history listed The Smurfs and Pee Wee's Playhouse as shows that met its broad criteria for educational and informational programs.[26]

Apart from possible disputes over a few minutes of programming here or there, or what types of programs are truly educational, there is a notable absence of any discussion in the Children's Television Order of information superhighways, media convergence, and multimedia opportunities. Statements about those developments have clogged the FCC's press office for the past few years, but the order focuses myopically on whether there is "enough" educational programming on broadcast stations, while ignoring completely all other media.

Both Chairman Hundt and Vice President Gore recently praised the cable industry for educational television and for "delivering the benefits of the communications revolution to all our children."[27] Yet the FCC's order says, "We believe . . . that the proper focus on this proceeding" should exclude programming on cable systems and other subscription services, such as direct broadcast satellite systems, because "some families cannot afford, or do not have access to, cable or other subscription services."[28] That, despite the fact that the FCC recently advocated, and the Supreme Court recently accepted, the argument that "cable television broadcasting . . . is as 'accessible to children' as over-the-air broadcasting, if not more so" and that most people receive television via cable, which provides entire networks dedicated to education.[29] Moreover, readers can search the FCC order in vain for any mention of VCRs, which by the FCC's own surveys are present in 85

percent of American households.[30] More to the point, 95 percent of homes with children have VCRs, and over a third of U.S. households have two or more of the devices.[31]

Political Reality 101

The urgency with which the FCC and the White House approached the children's TV issue would make little sense, and would be hard to explain, if 1996 had not been an election year. The long deadlock in the proceeding at the FCC was ended only after the White House scheduled a summit on children's TV and engaged in down-to-the-wire negotiations with the National Association of Broadcasters.[32] The V-chip and the new FCC rules became a key part of the president's campaign for reelection and were incorporated into the Democratic platform.[33]

Government control over the media in the name of children has become the ultimate "motherhood" issue, making politicians quake lest they be labeled anti-kid. A Washington Post headline in July proclaimed, "Culture War Score: Dems 5, GOP 0."[34] The article claimed that the Democrats had hijacked the "culture war" and "family values" issues, thus preempting traditional Republican campaign fodder. It described the phenomenon as "one of the shrewdest political heists in years." Similarly, a sidebar in a story on the White House deal on children's programming in the trade magazine Broadcasting & Cable stated simply, "Clinton Preempts Dole on Family-Friendly TV."[35]

Although the broadcast industry capitulated on the issue of children's television, the networks sought to avoid becoming part of the presidential campaign. For that reason, and unlike an earlier White House conference on televised violence, the network heads did not attend the July 29 White House kids' TV summit. As one broadcaster explained the decision, "They don't need CEOs as props."[36]

Beyond Congressional Intent

Whereas the politics of the children's TV debate is clear, the law is another matter altogether. Or, put another way, why is the FCC only now requiring mandatory programming mandates to implement a 1990 statute? The answer is that when the FCC first adopted CTA rules in 1991, it avoided quantitative programming rules on the basis of its understanding that Congress chose not to impose such onerous

conditions for broadcast licenses. The commission was right the first time.

It is an axiom of constitutional law that statutes must be interpreted so as to avoid constitutional problems. With respect to administrative agencies such as the FCC, laws must not be interpreted to create unnecessary First Amendment restrictions unless such a construction represents "the affirmative intention of the Congress clearly expressed."[37] With respect to the FCC, courts have emphasized that "we will not presume that Congress [intended to expand FCC jurisdiction over programming decisions] absent a clear statement to that effect."[38] The FCC's adoption of quantitative guidelines, therefore, is constitutionally suspect unless the agency can point to a legislative intention that compliance be based on quantified amounts of programming.

With respect to the CTA, congressional intent seems clear. Congress expressly declined to adopt a quantitative programming standard. Indeed, committee reports as well as statements of key legislators at the time emphasized that Congress did not intend to impose--or have the FCC adopt--a specified number of hours to be required of licensees. Both the Senate and the House reports on the CTA stated,

> The Committee does not intend that the FCC interpret this section as requiring a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast [to obtain license renewal] pursuant to this section or any section of this legislation.[39]

Sen. Daniel Inouye (D-Hawaii), who was then chairman of the Senate Communications Subcommittee, stated,

> Under this legislation, the mix [of general purpose programming specifically designed for children and nonbroadcast efforts] is left to the discretion of the broadcaster taking into account what other stations, including noncommercial ones, are doing in this important area. . . . The Committee does not intend that the FCC interpret this legislation as requiring or mandating quantification standards governing the amount or placement of children's educational and informational [programming] that a broadcast licensee must air to pass a license renewal review pursuant to this legislation.[40]

Similarly, Rep. Edward Markey (D-Mass.) explained, "The legislation does not require the FCC to set quantitative guidelines for educational programming, but instead requires the Commission to base its decision upon an evaluation of a station's overall service to children."[41] Senator Inouye further confirmed that each broadcast licensee should be afforded the "greatest possible flexibility in how it discharges its public service obligation to children" and that the "Committee expects that the Commission will continue to defer to the reasonable programming judgments of licensees."[42] If Congress intended to authorize the FCC to adopt a quantitative programming requirement, it chose a most curious way of expressing that view in the legislative history.

In addition, the FCC may have a difficult time demonstrating a significant governmental interest in such requirements. Where a regulation impinges on editorial discretion, the government may not simply assume that a problem exists or that the proposed solution is adequate. That is, it cannot "simply 'posit the existence of the disease sought to be cured'"; it must demonstrate that its asserted interest is important and that the regulation will in fact advance its interest.[43] Where, as here, the comments filed in the FCC's rulemaking proceeding demonstrate that broadcasters already provide educational and informational programming in excess of the proposed quantitative standard, it may be difficult to sustain the rule. Certainly there is nothing in the congressional findings that would support the commission's position.

The commission avoids the legislative history of the CTA--as well as its own previous conclusions about the law's meaning--by playing definitional games. It notes that "although there is specific language in the legislative history, cited in our 1991 Report and Order . . . stating the 'Committee does not intend that the FCC interpret this section as requiring or mandating a quantification standard,' this language does not prohibit us from seeking to provide greater clarity and guidance through a processing guideline."[44] Discounting the repeated expressions of congressional intent, the FCC now finds that a quantitative standard "will clarify the imprecision of our current rules that has led to a variation in the level and nature of broadcasters' compliance efforts that is incompatible with the intent of the CTA."[45] Yet the FCC itself stated that its review of "broadcasters' compliance efforts" was "inconclusive" and that Congress's decision to avoid a programming quota would necessarily make the programming mandate "imprecise." More important, a principal reason Congress did not

require a quantitative standard was to avoid First Amendment problems.

The Constitutional Limits of the Public Interest Standard

The lack of record may test the constitutional leniency that courts historically have applied to government regulation of the broadcasting medium. Regulated under the statutory "public interest" standard, broadcasting has received less constitutional protection than other methods of communication. The Supreme Court, in Red Lion Broadcasting Co. v. FCC, emphasized that "differences in characteristics of new media justify differences in the First Amendment standards applied to them."[46] Accordingly, content regulation has been allowed for broadcasting that would be unthinkable for the print medium--up to a point.

Courts in the past were willing to accommodate that intrusion on traditional First Amendment rights because the FCC approached its regulated subjects with a certain degree of noblesse oblige. From the beginnings of broadcast regulation, Congress and the FCC (and its predecessor agency, the Federal Radio Commission) understood that constitutional limitations meant something and that specific programming mandates could intrude on First Amendment rights. For example, one of the bills submitted before passage of the Radio Act of 1927 included a provision that would have required stations to comply with programming priorities based on subject matter. That provision was eliminated because "it was considered to border on censorship."[47] Similarly, once the Federal Radio Commission was established, it sought to "chart a course between the need of arriving at a workable concept of the public interest in station operation, on the one hand, and the prohibition laid on it by the First Amendment to the Constitution of the United States . . . on the other."[48]

Although the FCC's control over programming has in the past been generally considered to be more expansive than it is now, the commission itself has raised constitutional concerns over proposals to increase its authority. Thus, in 1960, the FCC emphasized, "In considering the extent of the Commission's authority in the area of programming it is essential 1st to examine the limitations imposed upon it by the First Amendment to the Constitution and Section 326 of the Communications Act."[49] After an extensive analysis of the meaning of the public interest, the FCC found that the required constitutional and statutory balance barred the

government from implementing specific programming requirements. It noted,

> Several witnesses in this proceeding have advanced persuasive arguments urging us to require licensees to present specific types of programs on the theory that such action would enhance freedom of expression rather than tend to abridge it. With respect to this proposition we are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgment of freedom of speech and press flatly forbids governmental interference, benign or otherwise. The First Amendment "while regarding freedom in religion, in speech, in printing and in assembling and petitioning the government for redress of grievances as fundamental and precious to all, seeks only to forbid that Congress should meddle therein."[50]

Such considerations led the commission to conclude that it could not "condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program."[51] To do so, the commission concluded, would "lay a forbidden burden upon the exercise of liberty protected by the Constitution."[52] In order to maintain a balance between a free competitive broadcast system, on the one hand, and the requirements of the public interest standard, on the other, the commission found that "as a practical matter, let alone a legal matter, [its role] cannot be one of program dictation or program supervision."[53]

The commission did not "blunder" or "make a colossal mistake" when it declined to require "specific, concrete, and real commitments from broadcasters," as Chairman Hundt now claims.[54] Rather, the FCC consciously balanced the constitutional imperative of the First Amendment with the public interest aspirations of the Communications Act. The commission found that while it may "inquire of licensees what they have done to determine the needs of a community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear."[55] In particular, public interest "standards or guidelines should in no sense constitute a rigid mold for station performance, nor should they be considered as a Commission formula for broadcasts in the public interest."[56] The commission emphasized that it did "not intend to guide the licensee along the path of programming; on the

contrary the licensee must find his own path with the guidance of those whom his signal is to serve."[57]

Recognizing that delicate balance, courts repeatedly have noted that the commission must "walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act."[58] The Supreme Court described that balancing act as "a task of great delicacy and difficulty" and stressed that "we would [not] hesitate to invoke the Constitution should we determine that the [FCC] has not fulfilled its task with appropriate sensitivity to the interests in free expression."[59] The Court found that the Communications Act was designed "to maintain--no matter how difficult the task--essentially private broadcast journalism."[60] For that reason, licensees are to be held "only broadly accountable to public interest standards."[61] More recently, in Turner Broadcasting System, Inc. v. FCC, the Supreme Court quoted the 1960 en banc policy statement and concluded that "although 'the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.'"[62]

Specific program requirements have always been considered constitutionally suspect in the context of broadcasting regulation. The District of Columbia Circuit has emphasized that the "power to specify material which the public interest requires or forbids to be broadcast . . . carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike."[63] Public interest requirements relating to specific program content create a "high risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest" and "must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship."[64]

In the very few instances in which Congress has adopted affirmative obligations--such as the requirement of section 312(a)(7) of the Communications Act that broadcast licensees provide "reasonable" access to federal political candidates--it has stressed that the requirement must be implemented "on an individualized basis" and not on the basis of "across-the-board policies."[65] The commission has never attempted to specify what amount of candidate access is "reasonable," and the Supreme Court's First Amendment analysis of the law was predicated on the level of deference to be accorded broadcasters' editorial discretion.[66]

Similarly, in Turner Broadcasting System, the Supreme Court emphasized "the minimal extent" that the government may influence the programming provided by broadcast stations, with particular emphasis on educational programming. After referring specifically to the Children's Television Act, the Court made clear that "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations."[67] The Court even noted that special frequencies reserved for "non-commercial educational" broadcasters "are subject to no more intrusive content regulation than their commercial counterparts."[68] It pointed out that "non-commercial licensees are not required by statute or regulation to carry any specific quantity of 'educational' programming or any particular 'educational programs,'" but that such licensees "need only adhere to the general requirement that their programming serve 'the public interest, conveyance or necessity.'"[69]

Indeed, regulatory treatment of educational noncommercial licensees provides an important test of the hypothesis that any specific programming requirements would be held unconstitutional. Previously, there were two exceptions to the general rule that noncommercial stations must meet the same public interest obligations as commercial stations: they were required to make and retain tape recordings of "controversial programs," and they were prohibited from editorializing.[70] Both of those heightened public interest requirements, however, have been struck down as First Amendment violations.[71] Similarly, the D.C. Circuit expressly avoided approving "a more active role by the FCC in oversight of programming" on educational stations because it would "threaten to upset the constitutional balance struck in CBS [v. DNC]."[72]

Grasping at Constitutional Straws?

The FCC's apparent failure to credit First Amendment concerns may unravel the precedent on which its expanded ability to regulate broadcast content is based--the "public trustee" concept. Red Lion has not yet been overruled, but its reasoning merits close reexamination. It is important to note that the constitutional balance struck in Red Lion was based on "'the present state of commercially acceptable technology' as of 1969."[73] The Supreme Court has noted that "because the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence."[74] As the U.S. Court of Ap-

peals for the D.C. Circuit found, "It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets."[75] Similarly, Chief Judge Richard S. Arnold of the Eighth Circuit noted,

> There is something about a government order compelling someone to utter or repeat speech that rings legal alarm bells. The Supreme Court believed, almost twenty-five years ago, that broadcasting was sufficiently special to overcome this instinctive feeling of alarm. In my opinion, there is a good chance that the legal landscape has changed enough since that time to produce a different result.[76]

The Supreme Court has increasingly distanced itself from the holding in Red Lion. In addition to downplaying the potency of government control over broadcasting content in Turner Broadcasting System, the Court gave only backhanded support for the Red Lion line of cases, noting that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation."[77] In other cases, the Court has indicated its willingness to reconsider Red Lion if the right circumstances are presented to it.[78]

Some people at the FCC have pointed to a recent decision of the U.S. Court of Appeals for the D.C. Circuit that upheld channel set-asides for "non-commercial programming of an educational or informational nature" on direct broadcast satellites. The court based its holding on Red Lion.[79] The decision, however, is merely an example of the necessary deference that appellate courts give to Supreme Court precedent. Such questions eventually will be appealed and will give the Supreme Court its long-awaited chance to reconsider the continuing validity of Red Lion.

Although the FCC's Children's Television Order relies heavily on Red Lion, the commission seeks to hedge its bet, by claiming that its stewardship of the broadcast spectrum gives it the power of a landlord and that it can demand programming as "payment" for its generosity. It notes that the fact that Congress decided to retain public ownership of the spectrum and "to lease it for free to private licensees for limited periods carries significant First Amendment consequences."[80]

At bottom, that argument adds very little to the Red Lion rationale. It suggests only that when the government in some way subsidizes speech it acquires the right to make editorial judgments for the speaker. However, there is no case law to support that view. Indeed, in cases involving public broadcasting, where this question has been squarely addressed, courts uniformly have rejected an expanded editorial role for the government.

In Community-Service Broadcasting, a plurality of the D.C. Circuit stated,

> Clearly, the existence of public support does not render [public] licensees vulnerable to interference by the federal government without regard to or restraint by the First Amendment. For while the Government is not required to provide federal funds to broadcasters, it cannot condition receipt of those funds on acceptance of conditions which could not otherwise be constitutionally imposed.[81]

That principle was affirmed by the Supreme Court in League of Women Voters, where a ban on editorials by public broadcasters was invalidated.[82] Similarly, the Court in Turner Broadcasting System noted that educational stations, in addition to being granted the free use of spectrum, also received funding through the Corporation for Public Broadcasting. Nevertheless, it found that "the Government is foreclosed from using its financial support to gain leverage over any programming decisions."[83]

If the government can demand anything in exchange for free use of the spectrum, it is perhaps limited to a requirement that such licensees provide free service to the public. The Supreme Court in Turner Broadcasting System described the overriding public interest in the system of free over-the-air broadcasting. As the Court noted, Congress's overriding objective in enacting must-carry "was not to favor programming of a particular subject matter, viewpoint or format, but rather to preserve access to free television programming for the 40% of Americans without cable."[84] It is this quality of broadcasting--free universal coverage of the nation--that makes it "a vital part of the Nation's communications system" and ensures "that every individual with a television set can obtain access to free television programming" that justifies the "special deal."[85]

A Child's First Amendment: Burning the Global Village to Roast the Pig

Finally, the FCC relies on what it calls the "Child's First Amendment" to justify its more intrusive regulation of broadcast speech.[86] The position draws on theories advocated by former FCC chairman Newton Minow suggesting that regulation of speech that relates to children is constitutional so long as it is reasonable.[87] That is exactly the same constitutional philosophy that produced the Communications Decency Act, championed by Sen. James Exon (D-Neb.), that proposed to regulate online speech in the name of children.

Indeed, the link between Senator Exon's view of the world and the FCC's is quite direct. The Children's Television Order expressly relies on the authority to regulate "indecent" speech under FCC v. Pacifica Foundation as support for the current educational requirements.[88] But governmental interest in protecting children from programming deemed to be inappropriate does not translate into a constitutional mandate to compel programming the government believes is beneficial. Moreover, constitutional limitations apply even when the government is seeking to promote the interests of children.

The FCC was previously more sensitive to such concerns. Thus, when it sought to encourage the industry to adopt the "family viewing hour" in the 1970s, the commission acknowledged that regulatory action "is less desirable than effective self-regulation, since government-imposed limitations raise sensitive First Amendment problems."[89] The commission noted, "Government rules could create the risk of improper governmental interference in sensitive, subjective decisions about programming, could tend to freeze present standards and could also discourage creative developments in the medium."[90]

Last summer's decision by the three-judge court in the Eastern District of Pennsylvania enjoining enforcement of the Communications Decency Act highlights the constitutional deficiency of overemphasizing the government's interest in protecting children. The court flatly rejected that rationale as a justification for limiting free speech. Judge Stuart Dalzell wrote that the government's interest in protecting children "is as dangerous as it is compelling."[91] He added, "Laws regulating speech for the protection of children have no limiting principle, and a well-intentioned law restricting protected speech on the basis of its content is, nevertheless, state sponsored censorship."

In particular, Judge Dalzell noted, "Time has not been kind to the Pacifica decision" and "the Supreme Court has repeatedly instructed against overreading the rationale of its holding."[92] To do so--as the FCC does in its Children's Television Order--"could burn the global village to roast the pig."[93] The same observations apply to the FCC's children's television rules. The commission's mandate for "educational" television plainly overreads the extent of the FCC's authority under both the governing statutes and the Constitution.

Notes

1. H. L. Mencken, The Vintage Mencken, ed. Alistair Cooke (New York: Vintage Books, 1955), p. 232.

2. "Tele Visions: FCC Chairman and His Social Scientist Friends Have Big, Bad Ideas for Kids' Programming," Editorial, Cleveland Plain Dealer, July 16, 1996.

3. See, for example, Reed E. Hundt, Speech at the National Press Club, July 27, 1995.

4. See, for example, James H. Quello, "The FCC's Regulatory Overkill," Wall Street Journal, July 24, 1996, p. A20.

5. Federal Communications Commission, Policy and Rules Concerning Children's Television Programming, 11 FCC Rcd. ¶1, p. 10661 (1996). Cited hereafter as Children's Television Order.

6. Ibid., ¶142, p. 10726.

7. George Orwell, "Politics and the English Language," in The Orwell Reader (San Diego: Harcourt Brace, 1984), p. 363 (emphasis in the original).

8. Serguein Martynov, "Free Expression in Belarus," Letter to the editor, Washington Post, June 5, 1996, p. A22.

9. Children's Television Order, ¶151, p. 10730. See also ¶157, p. 10732 ("Broadcaster has discretion to meet its public service obligation in the way it deems best suited . . the processing guideline that we adopt today does not limit this discretion").

10. Ibid., ¶149, p. 10729.

11. Ibid., ¶139, p. 10726 ("we believe these matters are best addressed on a case-by-case basis considering individual showings licensees may seek to make rather than by the adoption of program sponsorship guidelines").

12. "Hundt 'Pumped Up' about Clinton Call for Industry Summit on Children's TV," Bureau of National Affairs Daily Executive Report, June 14, 1996, p. A-19 (emphasis added).

13. Reed Hundt, Speech to the American Academy of Pediatrics, Boston, October 28, 1996.

14. See Federal Communications Commission, Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees, 2 FCC Rcd. 5272, 5277, 5287-88 (1987).

15. Ibid. at 5288.

16. Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 436 (1963) (Brennan, J., concurring).

17. Children's Television Order, ¶34, p. 10676.

18. Ibid., ¶50 and n. 126, p. 10685.

19. Ibid., Appendix A, E1.a., p. 10744

20. Ibid., ¶33, p. 10675.

21. Federal Communications Commission, Enforcement of Prohibitions against Broadcast Indecency, 18 U.S.C. §1464, 8 FCC Rcd. 704 (1993), aff'd, Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc).

22. Children's Television Order, ¶¶38, 41, pp. 10677, 10679.

23. Ibid., ¶40, p. 10678.

24. Ibid., ¶36, p. 10676.

25. Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992).

26. Children's Television Act of 1989, Senate Committee on Commerce, Science, and Transportation, S.R. 227, 101st Cong., 1st sess., 1989, pp. 7-8.

27. Reed Hundt, Speech to National Cable Television Association, 45th Annual Convention, Los Angeles, April 30, 1996; and Albert Gore, Speech to National Cable Television Association, 45th Annual Convention, Los Angeles, April 29, 1996.

28. Children's Television Order, ¶43, p. 10681.

29. Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2386 (1996).

30. Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 11 FCC Rcd. 2060 (1995).

31. Telecommunications Policy Review 12 (September 8, 1996): 3.

32. Chris McConnell, "Burning the Midnight Oil over Kid's TV," Broadcasting & Cable, August 5, 1996, p. 8.

33. Heather Fleming, "TV Gored in Chicago," Broadcasting & Cable, September 2, 1996, p. 6; and "Democrats' Platform Celebrates V-Chip, Kid's TV Deal," Broadcasting & Cable, August 12, 1996, p. 16.

34. Paul Farhi, "Culture War Score: Dems 5, GOP 0," Washington Post, July 7, 1996, p. C1.

35. Sidebar in Lynette Rice and Cynthia Littleton, "Industry Ponders Post-Pact Kids TV," Broadcasting & Cable, August 5, 1996, p. 12.

36. Chris McConnell, "11th-Hour Scramble," Broadcasting & Cable, July 29, 1996, p. 14.

37. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979) (citation omitted); and DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Counsel, 485 U.S. 568, 575 (1988).

38. Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 294 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976).

39. S.R. 227, 101st Cong., 1st sess., 1989, at 23; and H.R. 385, 101st Cong., 1st sess., 1989, at 17.

40. Congressional Record (July 19, 1990) 136, S10122.

41. Congressional Record (October 1, 1990) 136, H8537.

42. Congressional Record (July 19, 1990) 136, S10121-22.

43. Turner Broadcasting System v. FCC, 114 S. Ct. 2445, 2470 (1994) (citation omitted).

44. Children's Television Order, ¶129, p. 10722.

45. Ibid.

46. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

47. See FCC v. WNCN Listeners Guild, 450 U.S. 582, 597 (1981) (citing Hearings on H.R. 5589 before the House Committee on the Merchant Marine and Fisheries, 69th Cong., 1st sess., 1926, p. 39).

48. Federal Communications Commission, Report and Statement of Policy re: Commission en Banc Programming Inquiry, 14 FCC Rcd. 2303, 2313 (1960).

49. Ibid. at 2306.

50. Ibid. at 2308 (citation omitted).

51. Ibid.

52. Ibid., quoting Cantwell v. Connecticut, 310 U.S. 926, 296, 307 (1940).

53. Ibid. at 2309.

54. Hundt, Speech to the National Press Club.

55. Federal Communications Commission, Report and Statement of Policy at 2308.

56. Ibid. at 2313.

57. Ibid. at 2316.

58. CBS, Inc. v. DNC, 412 U.S. 94, 117 (1973); and Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968), cert. denied. sub nom. Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969).

59. CBS, Inc. v. DNC at 102-3.

60. Ibid. at 120.

61. Ibid.

62. Turner Broadcasting System at 2463 (citation omitted).

63. Banzhaf at 1095.

64. Ibid. at 1096. See also Public Interest Research Group v. FCC, 522 F.2d 1060, 1067 (D.C. Cir. 1975), cert. denied, 424 U.S. 965 (1976) ("we have doubts as to the wisdom of mandating . . . government intervention in the programming and advertising decisions of private broadcasters"); and Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 172 ("the First Amendment demands that [the FCC] proceed cautiously [in reviewing programming content] and Congress . . . limited the Commission's powers in this area").

65. CBS, Inc. v. FCC, 453 U.S. 367, 386-87 (1981) (interpreting legislative history of 47 U.S.C. 312(a)(7)).

66. Ibid. at 396-97.

67. Turner Broadcasting System at 2463-64.

68. Ibid. at 2463.

69. Ibid.

70. See Accuracy in Media at 291.

71. FCC v. League of Women Voters of California, 468 U.S. 364 (1984) (editorial ban invalidated); and Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102 (D.C. Cir. 1978) (en banc) (taping requirement struck down).

72. Accuracy in Media at 296-97. See also Community-Service Broadcasting at 1115 (FCC and courts have generally eschewed "program-by-program review" schemes because of constitutional dangers).

73. News America Publishing, Inc. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988), quoting Red Lion at 388. See also Meredith Corp. v. FCC, 809 F.2d 863, 867 (D.C. Cir. 1987).

74. CBS v. DNC at 102.

75. Banzhaf at 1100.

76. Arkansas AFL-CIO v. FCC, 11 F.3d 1430, 1443 (8th Cir.) (en banc) (Arnold, C.J., concurring); see also Syracuse Peace Council v. FCC, 867 F.2d 654, 684-85 (D.C. Cir. 1989),

cert. denied, 493 U.S. 1019 (1990) (Starr, J., concurring) (Red Lion has been undermined by technological and market developments).

77. Turner Broadcasting System at 2456 (emphasis added).

78. See League of Women Voters of California at 376n. 11.

79. Time Warner Entertainment Company v. FCC, 93 F.3d 957 (D.C. Cir. 1996).

80. Children's Television Order, ¶149, p. 10729.

81. Community-Service Broadcasting at 1110.

82. League of Women Voters of California at 376.

83. Turner Broadcasting System at 2464.

84. Ibid. at 2461.

85. Ibid.

86. Children's Television Order, ¶153n. 327, p. 10731.

87. Ibid. See also Newton Minow and Craig LaMay, Abandoned in the Wasteland (New York: Hill and Wang, 1995), chap. 3.

88. FCC v. Pacifica Foundation, 438 U.S. 726 (1978)

89. Federal Communications Commission, Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 420 (1975).

90. Ibid.

91. ACLU v. Reno, 929 F. Supp. 824, 882 (E.D. Pa. 1996).

92. Ibid. at 875.

93. Ibid. at 882.

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Digital Broadcasting and the Public Interest

Reports and Papers of
The Aspen Institute Communications and Society Program

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Editors

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Self-Regulation and the Public Interest

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Can self-regulation of broadcasting serve the public interest? And if so, how should such a policy be implemented?

Before these questions can be addressed it is necessary to define terms. "Self-regulation," in this context, means no government regulation of broadcast content. In addition to eliminating rules that dictate programming decisions, this includes the absence of rules disguised as "policy statements" from government agencies, programming guidelines, quid pro quo deals, social contracts, social compacts, government-inspired industry "codes" or whatever else might be the current raised eyebrow technique for extracting concessions from licensed media.

With this understanding of self-regulation, the answer to the second question is straightforward: self-regulation should be implemented by ending direct and indirect government content controls.

The first question is not as easily answered, however, given the amorphous nature of the public interest standard. But experience suggests that the public is better served when electronic publishers are free to address audience interests. To the extent that some observers believe that important informational needs will be unmet when broadcasters merely respond to what interests the public, non-regulatory solutions provide the most direct and effective way of meeting these needs. Public broadcasting, the public library of the air, plays an important role by providing additional meritorious programming.

JUST SAY NO!

The seemingly self-evident proposition that self-regulation eliminates government control over private editorial decisions is

not always so clear to Washington policymakers. If it were, the question of how to implement self-regulation would not arise. Many of the current exemplars of "self-regulation" lack an important component: the "self." Accordingly, they do not serve as models for purposes of this analysis.

The V-chip requirement of the *Telecommunications Act of 1996* is an example of "self-regulation" that involves a great deal of government involvement. Section 551 of the Act, which implements the V-chip and its television ratings scheme, is expressly described in the law as "voluntary." Although Section 551(b) empowers the Federal Communication Commission (FCC) to prescribe "guidelines and recommended procedures for the identification and rating of video programming that contains sexual, violent, and other indecent material about which parents should be informed before it is displayed to children,"[1] that provision was to take effect only if the Commission determined (in consultation with "appropriate public interest groups and interested individuals from the private sector") that video programming distributors [had] not "established voluntary rules for rating video programming that . . . are acceptable to the Commission" and "agreed voluntarily to broadcast signals that contain ratings of such programming."[2]

After the first ratings system proposed by the television industry met with congressional opposition, the industry offered a revised proposal with more detailed program ratings. However, when the NBC television network declined to "volunteer" for the revised system, Senator John McCain, chairman of the Senate Commerce Committee, issued the following warning to the network:

> If [NBC] fail[s] to heed this call [to join with the rest of the television industry] by remaining the one company in the industry that puts its own interests ahead of its viewers, I will pursue a series of alternative ways of safeguarding, by law and regulation, the interests that NBC refuses to safeguard voluntarily. These will include, but not be limited to, the legislation offered by Senator [Ernest] Hollings to channel violent programming

> to later hours, as well as urging the Federal Communications Commission to examine in a full evidentiary hearing the renewal application of any television station not implementing the revised TV ratings system.[3]

After confirming that the modified ratings system followed "the threat of legislation," Senator McCain told the *Washington Post* that the system "was voluntary in that we [in Congress] did not dictate the terms of the agreement, and, yes, we expect everyone to comply with it."[4] The FCC approved the revised ratings system and technical rules in March 1998.[5] Ted Turner best described the nature of the V-chip affair: "We don't really have any choice. We're voluntarily having to comply."[6]

As this example demonstrates, self-regulation can be a tricky concept in the context of media regulation, because broadcasters periodically must seek license renewal and other approvals from the FCC.[7] Most such cases go unchallenged, perhaps for the same reason the government has leverage in the first place: Issues may come and go, but the power of the licensing agency always looms large in the life of the licensee. Accordingly, the misnomer of "self-regulation" persists.

Yet where such tactics are subjected to judicial scrutiny, government assertions of noninvolvement in program regulation wear quite thin. For example, the U.S. Court of Appeals for the D.C. Circuit struck down a requirement that noncommercial radio stations make audio tapes of programs in which "issues of public importance" were presented. It found that both commercial and noncommercial broadcasters are subject to "a variety of *sub silentio* pressures and 'raised eyebrow' regulation of program content." Accordingly, it said, even a seemingly neutral regulation could be invalid to the extent it increases the likelihood that broadcasters "will censor themselves to avoid official pressure and regulation."[8] As the D.C. Circuit noted in another case, "[t]alk of 'responsibility' of a broadcaster in [a licensing proceeding] is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments."[9]